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No. 88-1970

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

BURNING TREE CLUB, INC., *et al.*,
Petitioners

v.

STATE OF MARYLAND, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Maryland

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REPLY BRIEF FOR PETITIONERS

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The respondents' Brief in Opposition has two principal flaws. The first is its reliance on false assertions from non-record sources to distract the Court from the undisputed facts of this case. The second is its overstatement and misstatement of the case law. This reply addresses a few examples of those flaws.

1. In this Court, for the first time, the State argues that Burning Tree is not small, selective, or private, without a single citation to the record. *See* Brief in Opposition at 12. Yet in its Answer to paragraph 33 of Burning Tree's Second Amended Complaint, the State *admitted* that "Burning Tree is a small, highly selective club composed of men who are chosen on the basis of their congeniality with one another and their devotion to the game of golf." The State had good grounds for that

admission, since it had investigated the club's policies in 1978.[1] Moreover, the undisputed record fully supports the State's admission. *See* Burning Tree's Petition for Writ of Certiorari at 9-13. The State's about-face has placed it in the comical position of relying throughout its brief on irrelevant, non-record assertions and innuendo that happen to be false in every instance—perhaps best exemplified by its reliance on a five-year-old triple hearsay newspaper account of events that allegedly occurred over thirty years ago. *See* Brief in Opposition at 2, n.2.[2]

2. The State correctly points out that there is tension between the doctrine of cases such as *Speiser v. Randall*, 357 U.S. 513 (1958) and *Perry v. Sindermann*, 408 U.S. 593 (1972), on the one hand, and cases such as *Norwood v. Harrison*, 413 U.S. 455 (1973), *Green v. Connally*, 330 F. Supp. 1150 (D.D.C.), *aff'd sub nom. Coit v. Green*, 404 U.S. 997 (1981), and *Bob Jones University v. United States*, 461 U.S. 574 (1983), on the other. *See*

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[1] The State complains for the first time in its Brief in Opposition about its decision not to take discovery into Burning Tree's members' exercise of their First Amendment rights. Brief in Opposition at 8-9, n.9. The State could have conducted discovery at any time during the eleven months between Burning Tree's assertion of a First Amendment claim on September 5, 1986, and the trial court's decision of July 21, 1987. The State's decision not to do so is an obvious reflection of the fact that its investigation of the club had convinced it that the club is highly selective and private. If the State had taken discovery it would have discovered that Burning Tree strongly enforces policies to ensure that it remains private and devoted solely to golf, as is evidenced by the excerpt from a recent version of the traditional welcoming letter sent by the club's president to new members that is printed in Appendix A.

[2] Appendix B to this reply contains an excerpt from an affidavit by James Gibbons, a former president of Burning Tree, that was filed in connection with *Burning Tree Club, Inc. v. Bainum*, 305 Md. 53, 501 A.2d 817 (1985), one of the earlier attempts to force a change in the club's policies. That affidavit refutes the false, press-inspired image upon which the State rests its argument that the club is not private.

Brief in Opposition at 14-17. That tension underscores the need for review in this case. The tension arises because the latter cases, in which (unlike this case) the facts supported no right of freedom of association, contain language that can be read to suggest that a state's interest in eradicating discrimination will always prevail over a private right of association.[3] This Court should establish a clear line beyond which government may not go to coerce private parties to conform to conduct that the government deems socially desirable. The State apparently contends that in tax cases no such line exists—that a government can deny run-of-the-mill tax benefits to individuals because of political non-conformity.

3. The State continues to mischaracterize the benefits for which Burning Tree bargained in its contract as a "subsidy." Brief in Opposition at 12, n.13. Burning Tree paid handsomely—in contract terms, gave substantial consideration—by giving up its right to develop a multi-million dollar parcel in a highly desirable part of Montgomery County. The State chose to pay for that benefit by deferring the club's taxes, rather than by some other method. The basis of the contract between the club and the State was deferral of taxes in exchange for an agreement not to develop the land. No "subsidy" is involved.

4. The State argues that Burning Tree is performing a "governmental function" and has accepted "State tax support," and that therefore its members have lost their First Amendment right of association. Brief in Opposi-

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[3] The cases upon which the State relies are distinguishable in other respects. One clear basis for distinguishing them is that they involved the fundamental overriding public policy against racial discrimination in education—a far cry from Maryland's vendetta against the membership policy of a single private golf club. Moreover, as pointed out by the brief of *amicus curiae* the National Club Association, *Bob Jones* rests on a point of statutory interpretation, not constitutional law. *See* Brief of Amicus Curiae at 9.

tion at 13. That is a poorly disguised rehash of its contention in an earlier round of litigation that Burning Tree's contract makes its policies "state action." The State has already lost that claim. The Maryland Court of Appeals held in *Burning Tree Club, Inc. v. Bainum*, 305 Md. at 75-76, 85, 501 A.2d at 828, 833 (1985) that "Burning Tree is not a 'state actor' ".[4]

5. The State argues that Burning Tree's claim under the Contract Clause does not merit review because the State's present desire to abandon its obligations was somehow "foreseeable" in 1981 when the club and the State voluntarily entered into a new contract. Brief in Opposition at 18-19. That assertion is without factual support or record citation. Even if it were true, however, the main reason that parties enter into binding contracts is to allocate risks—including the risk that the other party will decide that it does not wish to perform. The State's cavalier attitude toward its contract with Burning Tree emphasizes the need for this Court to affirm that a state may not walk away from a contract simply because it is politically advantageous to do so. That need is particularly great in this case, in which Burning Tree may still face a retroactive, contract-imposed penalty of having to pay taxes deferred during prior years if it decides to sell its property. *See* Md. Tax-Property Code Ann. § 8-216(c).

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[4] The State also contends that Burning Tree somehow "surrendered" its members' right to freedom of association by contracting with the State to provide open space, even though every contract that Burning Tree has signed has *permitted* its policy of allowing only men as members and guests. *See* Brief in Opposition at 13. If the State's longwinded recitation of Burning Tree's resistance to attempts to force it to change its policies (*see* Brief in Opposition at 2-8) proves anything, it proves that Burning Tree has always vigorously preserved and defended its members' right of freedom of association, and has steadfastly resisted the State's attempts to take that freedom away. That is far from the "knowing" and "voluntary" conduct required to waive constitutional rights. *Brady v. United States*, 397 U.S. 742, 748 (1970).

6. The State's argument that this Court should not review its taking of Burning Tree's property rights under *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (Brief in Opposition at 19-21) ignores two fundamental points. First, the taking issue is purely legal, and all facts necessary to decide it are before this Court. Second, in its brief to the Maryland Court of Appeals, *its first filing on the merits after Nollan was decided*, Burning Tree squarely raised the taking issue in the following language:

> The State is attempting to require Burning Tree to admit women as a condition to receiving an open-space tax deferral, even though the First and Fourteenth Amendments prevent the State from *directly* requiring the club to admit women. The recent Supreme Court case of *Nollan v. California Coastal Commission*, —— U.S. ——, 107 S.Ct. 3141 (1987), shows that the State cannot do this *for an additional reason.*
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> * * * *
>
> *Nollan* makes clear that even in those situations when the Constitution might allow the State to impose as a condition to the receipt of a benefit something that it could not require directly, it still prevents the State from imposing the condition when that condition has no connection to the purpose for which the State grants the benefit. In this case, the purpose behind the tax deferral is the provision of open space, and the State could deny the tax deferral outright if a club does not provide open space. Requiring a club to admit women, however, does not further the purpose of providing open space. Therefore, under *Nollan*, the State cannot require Burning Tree to admit women as a condition of receiving the tax deferral. (Emphasis added.)

That is the same argument that Burning Tree is making in this Court.

CONCLUSION

For the reasons stated herein and in Burning Tree's Petition for a Writ of Certiorari, this Court should issue a writ of certiorari to review the decision of the Court of Appeals of Maryland.

Respectfully submitted,

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APPENDIX A

EXCERPTS FROM LETTER FROM PRESIDENT TO NEW MEMBERS

* * * *

We try to have only so many rules as will help us to avert sheer chaos. It must be borne in mind that we are a completely private Club—existing only for the pursuit of golf and its attendant fellowship—and only Members and their guests may use the Clubhouse and Course.

Let me emphasize that we have strictures on the conditions and circumstances under which guests may be invited to use the Club's facilities.* Other pertinent provisions from the By-Laws relating to guests are set forth in the Club Membership Book, and I strongly urge you to familiarize yourself therewith to save you and the Club from even any appearance of embarrassment. Also, please bear in mind that, in keeping with the spirit of Burning Tree, guests should be invited solely for social purposes.

We pride ourselves on the fact that Membership in the Club is *personal*—we have no corporate or business memberships, stated or unstated, formal or informal. Position, status, rank, prestige—all are shed at the front gate, and, in return, every Member is assured that he will not be imposed upon in any manner while he is at the Club or by reason of his Membership in the Club.

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* For example, Section 6 of the Article XIII of the Club By-Laws provides: "No person shall be invited to be or shall be a guest at the Club more than four times a year. This provision may be waived by the President or the Chairman of the Membership Committee with regard to a person whose nomination for membership has been completed and filed with the Chairman of the Membership Committee."

Section 8 of the same Article provides: "A Member desiring to invite more than three guests at any one time shall obtain the prior approval of the president, or in the absence of the President, the Vice President.

Lobbying, soliciting, and conducting business, and any conduct that remotely suggests any of these activities, are altogether inappropriate at Burning Tree. Any lack of adherence to this standard of conduct is completely inconsistent with the purposes of the Club, and may constitute the basis for disciplinary action by the Board of Governors, including, in appropriate cases, expulsion from the Club.

* * * *

Passing on to other maters, let me strongly encourage you to participate in the Sunday Morning Breakfast Foursomes. This unique institution will quickly expose you to a large number of Members and accelerate your full enjoyment of the Club.

Also, if you have not already done so, I urge you to make yourself known to Kevin Danmeyer, the Club Manager, and to Max Elbin, our Golf Professional, and to their staffs. Because of our small membership, the patronage of the Members is quite meaningful to the financial well-being of the Club. Accordingly, I hope you will give the dining room, the nineteenth hole, and the pro shop your complete support.

We shall rely on your sponsors to orient you to the ways of the Club, but please do not hesitate to speak with me or with any other Member of the Board if you need any assistance in this regard.

I am sure by now you have become a true participant in the spirit of Burning Tree and I hope you have as much enjoyment therein as I have had for many years. There is no other Club like it.

APPENDIX B

EXCERPT FROM AFFIDAVIT OF JAMES GIBBONS DATED DECEMBER 22, 1983

Over the years a false image has developed of Burning Tree as "the Club of Presidents," because it has been reported that every President since its founding has been a member. It has also been stated in the press on numerous occasions that every Supreme Court Justice until Justice O'Connor's appointment was extended an invitation for membership, and that all male Cabinet officers are extended invitations. All of these statements are not only incorrect, but are bottomed on fundamental misconceptions regarding the Club's membership policies and practices. The Club's by-laws state that four officials *may* be elected as honorary members: the President, the Vice-President, the Chief Justice, and the Speaker of the House; and that such other persons *may* be elected as honorary members "as in the judgment of the Board of Governors have rendered outstanding special service to their country or the Club." Pursuant to these provisions, *some* Presidents, Vice-Presidents, Chief Justices and Speakers have been made honorary members. The last President to have been a member was Gerald Ford, who was a member before becoming President. Supreme Court Justices are not routinely made members. (In the last twenty years, only two active members of the Court have been members of the Club.) Some federal officials, including some Senators and Congressman, have been elected members. The decisive criteria in every case, however, are the man's dedication to the game of golf and compatibility with the Club's members, not his status.